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01-727

Supreme Court, U.S.
FILED
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No. 01-

IN THE
Supreme Court of the United States

LOUIE A. FERRO, JR.; LOUIE A. FERRO, SR.;
WILBUR SWIFT; KEVIN D. STALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ORIGINAL

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85 pp

QUESTIONS PRESENTED

For more than a century, district courts, including those in the Eighth Circuit, served as a *gatekeeper* to dismiss charges lacking minimal evidence of any element, including materiality. *United States v. Bailey*, 34 F.3d 683, 687 (8th Cir. 1994), *applying United States v. Lasater*, 535 F.2d 1041, 46-48, 50 (8th Cir. 1976); *see United States v. Gaudin*, 515 U.S. 506, 517 (1995). This Court commented approvingly on this principle of law in its decision in *Gaudin*, and cited various courts that had followed this principle. *Id.* at 517. In this case, the Eighth Circuit interpreted this Court's holding in *Gaudin* — that a defendant is entitled to have the element of materiality in a criminal fraud case determined by the jury — to prohibit a district court from continuing its *gatekeeper* function in dismissing charges prior to trial or submission to the jury when the government has failed to present even minimal evidence of materiality. Additionally, the Eighth Circuit did not accord the findings of fact made by the district court in this case clearly erroneous deference.

The first question presented is whether a district court can make a finding of fact that there is insufficient evidence to support the element of materiality and dismiss the charge, or whether petitioners must be subjected to the expense, time and emotional distress of having the materiality element submitted to a jury.

The second question presented is whether the Eighth Circuit erred in failing to accord the district court's findings of fact clearly erroneous deference.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The magistrate judge's report and recommendation (per Hays, M.J.) to grant petitioners' motion to dismiss the indictment for failure to state an offense (Appendix ("Pet. App.") 21a-41a) is not otherwise published. The district court's opinion (per Wright, D.J.) granting petitioners' motion to dismiss the indictment for failure to state an offense (Pet. App. 8a-20a) appears at 2000 WL 33394614. The court of appeals' opinion (per Loken, J., joined by Heaney and Bye, JJ.) reversing (Pet. App. 1a-7a) is published at 252 F.3d 964. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 42a) appears at 2001 U.S. App. LEXIS 18150.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on June 7, 2001, and denied rehearing and rehearing en banc on August 2, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a), and an exemption to those provisions under the Nonprofit Institutions Act, 15 U.S.C. § 13c, relevant to this petition are reprinted in the Appendix at 43a.

STATEMENT OF THE CASE

A Grand Jury in the United States District Court for the Western District of Missouri returned a fifteen-count indictment alleging, *inter alia*, that the petitioners engaged in mail fraud, and petitioners moved to dismiss the indictment. After an evidentiary hearing, the magistrate judge issued a Report and Recommendation recommending that the indictment be dismissed. After oral argument, the district court adopted the findings of the magistrate judge and issued an Order dismissing the indictment. The Court of Appeals for the Eighth Circuit reversed and denied petitioners' motion for a rehearing and rehearing *en banc*.

1. Petitioners engaged in the distribution of pharmaceutical products and operated through two organizations: Penn Plaza Pharmacy was a retail outlet (Tr. 12-13, 22; Ex. 3), and Home Care Pharmacy sold primarily to patients in nursing homes (Tr. 12-13, 23; Ex. 3). The prices that these two organizations paid for the same pharmaceutical products were dramatically different (Tr. 8-10, 16-17, 21-23). For example, for Accupril Penn Plaza Pharmacy was charged $73.75 and Home Care Pharmacy was charged $38.18 by the same manufacturer for the same quantity (Tr. 22; Ex. 12). District Court findings of fact 1, 2, 3, 4 (Pet. App. 10a-12a).

A pharmaceutical seller who sells the same product at different prices to different purchasers engages in price discrimination, a business practice which may or may not be prohibited by the Robinson-Patman Act. 15 U.S.C. § 13. Price discrimination may allow the seller to increase profits and sell more product (Tr. 24). To be successful in the marketplace, a seller who engages in price discrimination must prohibit diversion, the practice by which a price-favored purchaser in the low price channel of distribution resells to purchasers in the high price channel of distribution (Tr. 24-25, 74-76). District Court finding of fact 11 (Pet. App. 15a).

In the pharmaceutical industry, there is a diversion market in which price-favored purchasers who obtain price discounts engage in competition by reselling drugs to price-disfavored purchasers who otherwise would pay a higher price (Tr. 16). Home Care Pharmacy, who received substantial price discounts, engaged in such competition by reselling to price-disfavored wholesalers who, like Penn Plaza Pharmacy, would otherwise pay a higher price to the original seller (Tr. 13, 23). District Court finding of fact 1, 5 (Pet. App. 10a, 12a).

2. On July 14, 1999, a Grand Jury in the United States District Court for the Western District of Missouri returned a fifteen count indictment against the petitioners. The crux of all of the counts of the indictment is that petitioners defrauded various pharmaceutical sellers into granting substantial price discounts by signing standard form contracts in which the petitioners misrepresented that they were purchasing for their "own use."[1] The petitioners allegedly violated these contractual provisions when they subsequently competed with the pharmaceutical sellers by engaging in diversion and selling to price-disfavored purchasers who otherwise would have paid a higher price.

On October 15, 1999, petitioners filed a Joint Motion to Dismiss the Indictment for Failure to State an Offense, arguing that the "own use" clauses sought representations of compliance with the Nonprofit Institutions Act ("NIA"), 15 U.S.C. § 13c, an exemption to price discrimination that is prohibited by the Robinson-Patman Act, 15 U.S.C. § 13(a).

1. "Own use" is only one of three representations sought by pharmaceutical manufacturers to determine eligibility under the Nonprofit Institutions Act ("NIA"). 15 U.S.C. § 13c. Each representation is *necessary* for eligibility under the NIA. In addition to "own use," the other necessary representations are "not operated for profit" and being a school, college, university, public library, church, hospital, or charitable institution.

Petitioners contended that their alleged acts of not complying with "own use" clauses were not a scheme to defraud, supported the public policy of free and open competition underlying the Robinson-Patman Act, and were beyond the outer limits of the mail fraud statute. The government opposed petitioners' motion, taking the position that the NIA and the Robinson-Patman Act were irrelevant to the "own use" clauses through which petitioners allegedly committed fraud.

3. On November 23, 1999, the magistrate judge conducted an evidentiary hearing on petitioners' motion to dismiss. At the evidentiary hearing, petitioners presented evidence as well as written and oral expert testimony. For its part, the government stipulated to the documents introduced by petitioners (Tr. 10-11), called no witnesses (Tr. 96), and introduced no evidence (Tr. 96). The government opted, instead, only to cross-examine petitioners' two experts (Tr. 52-73, 86-93).

Through one of their experts, petitioners introduced examples of the actual "own use" clauses through which they allegedly committed fraud. These clauses, which were part of standard form contracts drafted by the pharmaceutical sellers, cited to the NIA, caselaw interpreting the NIA, or both. For example, one contract required petitioners to represent that, "I further certify that pharmaceuticals will be sold or dispensed only to members of this facility and only for the facility's 'own use' within the meaning of 15 U.S.C. § 13C (52 Stat. 446)." Ex. 5; District Court finding of fact 8 (Pet. App. 13a). Another "own use" clause cites to a Supreme Court case that construes the NIA,[2] and yet another cites to

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2. I certify that the above-named Client [Home Care Pharmacy] is not engaged in retail sales and that all items purchased through the GeriMed Program will

(Cont'd)

the same case as well as a Ninth Circuit opinion which also construes the NIA.[3] Petitioners also introduced evidence that in the same contracts, petitioners consistently and truthfully represented that they were not "Nonprofit Institutions" because they operated through Home Care Pharmacy, a for-profit organization.[4]

One of petitioners' experts examined the "own use" clauses in light of the pharmaceutical sellers' strategy to maintain two channels of distribution, one in which they charge low prices and one in which they charge high prices (Tr. 16-17). Through an opinion letter and testimony, this expert explained that the "own use" clauses were integral to the price discrimination strategy because "own use" clauses

(Cont'd)

> be utilized consistent with the established guidelines based on [sic] United States Supreme Court decision in *Abbott Laboratories, et al. v. Portland Druggists Association, et al.*

Ex. 4A; District Court finding of fact 9 (Pet. App. 13a-15a).

3. Home Care Pharmacy certifies that although it is not a non-profit institution within the meaning of the Non Profit Institutions Act, pharmaceuticals purchased at contract pricing are for Home Care Pharmacy's "own use," as defined in *DeModena, et al. v. Kaiser Foundation Health Plan, Inc., et al.*, 743 F.2d 13888 [sic] (9th Cir. 1984) applying the holding of the U.S. Supreme Court in *Abbott Laboratories, et al. v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1 (1976).

Ex. 4, 6; District Court finding of fact 7 (Pet. App. 12a-13a).

4. District Court findings of fact 6 (Ex. 4B), 7 (Ex. 4D), 8 (Ex. 5, 5A), 9 (Ex. 4A) (Pet. App. 12a-15a). Further, petitioners truthfully represented to the pharmaceutical sellers that Home Care Pharmacy sold products to patients in twenty-two nursing home facilities, twenty-one of which were listed as for-profit organizations. District Court finding of fact 10 (Ex. 7) (Pet. App. 15a).

prevent diversion by price-favored purchasers who compete with the pharmaceutical sellers by reselling into the high price channel of distribution (Tr. 47-48, 74). This expert explained that, if the pharmaceutical sellers could not prevent diversion, the pharmaceutical sellers would not be able to maintain high prices to purchasers in the high price channel of distribution and the pharmaceutical sellers' price discrimination strategy would not be successful in the marketplace (Tr. 24-25).

This expert also examined the "own use" clauses in light of the Robinson-Patman Act and the NIA. This expert explained the elements of a *prima facie* case of prohibited price discrimination (Tr. 28), the affirmative defenses (Tr. 30), and the requirements of the NIA, an exemption to the Robinson-Patman Act (Tr. 33-34). The expert indicated that there is no logical reason to seek representations of compliance with an exemption unless the price discrimination strategy appears to come within the *prima facie* elements of prohibited price discrimination but does not appear to come within the affirmative defenses (Tr. 32, 36-37).

This expert also testified about facts surrounding the pharmaceutical sellers' practice of selling products, at substantially different prices, in separate channels to Penn Plaza Pharmacy and to Home Care Pharmacy, the organization through which petitioners allegedly engaged in fraud. The expert examined facts pertaining to each of the elements of a *prima facie* case of prohibited price discrimination and concluded that the pharmaceutical sellers' price discrimination strategy appears to satisfy each of the elements of a *prima facie* case.[5] The expert

5. Tr. 18, 21, 29 (price difference); Tr. 29 (two buyers from same seller); Tr. 28, 29 (commodities); Tr. at 29 (like grade and quantity); Tr. 28-29, 35 (competitive injury). The expert's analysis was directed to secondary-line price discrimination. The expert testified that primary and secondary-line discrimination were different, and the expert applied the standard of likely competitive injury that is consistent with secondary-line discrimination.

also examined facts pertaining to each of the affirmative defenses and concluded that the pharmaceutical sellers' price discrimination strategy did not appear to come within an affirmative defense (Tr. 30-32, 35-36).

This expert testified about facts surrounding the purchase and resale of price discounted pharmaceutical products by Home Care Pharmacy in light of the NIA exemption. The expert explained the three separate and distinct requirements that the price-favored purchaser must be [1] an exempt institution, [2] that purchases for its "own use," and that [3] is "not operated for profit." Tr. 33-34. Because Home Care Pharmacy, the price-favored purchaser in this case, was a for-profit organization (Tr. 37-41, 44), the expert concluded that the NIA exemption was not available to protect the pharmaceutical sellers' otherwise illegal price discrimination strategy (Tr. 34).

On February 8, 2000, the magistrate judge issued a Report and Recommendation recommending that petitioners' motion should be granted and that the indictment should be dismissed. Pet. App. 21a-41a. The Report and Recommendation contained detailed findings of fact as well as a discussion of the legal issues. The government objected to the magistrate judge's Report and Recommendation in a motion filed in the district court on February 25, 2000. After briefing by the parties, the district court held a hearing on May 1, 2000, at which the parties presented oral argument.

4. At the hearing before the district court, petitioners presented two arguments first introduced through their experts and extensively briefed before the district court. Petitioners pointed out that they did not defraud the pharmaceutical sellers into believing that petitioners complied with the requirements of the NIA exemption because the petitioners consistently and truthfully represented that they did not satisfy the additional and necessary element of "not operated for profit." Tr. 44-47,

83-86. Petitioners also pointed out that, because the pharmaceutical sellers' price discrimination strategy appeared to transgress the prohibition of price discrimination in the Robinson-Patman Act, the "own use" clauses were tainted with illegality and should not be enforced, either by way of a civil action or by way of criminal sanctions (Tr. 50-52, 78-83).

For its part, the government continued to argue that the NIA and the Robinson-Patman Act were irrelevant to the "own use" clauses through which petitioners allegedly committed fraud. In so doing, the government continuously failed to answer the questions of why the pharmaceutical sellers required the petitioners to sign the "own use" clauses and whether the "own use" clauses were tainted with illegality because those clauses were integral to an illegal price discrimination strategy.[6]

On May 8, 2000, the district court issued an Order granting petitioners' Motion to Dismiss. Pet. App. 8a-20a. The district court effectively adopted, as its own, the Report and Recommendation of the magistrate judge. The district court's Order contains detailed findings of fact and a discussion of legal issues.

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6. The government's remaining arguments did not address the questions raised by the petitioners. The government objected that petitioners' expert did not have sufficient time to gather and analyze facts to prove, conclusively, that the pharmaceutical sellers were engaged in illegal price discrimination, but the government offered no facts to remove antitrust issues by showing an affirmative defense or compliance with an exemption. The government objected that petitioners' expert applied a *per se* antitrust theory, but the government never responded to the expert's analysis of likely competitive injury. The government objected that petitioners' expert did not define a relevant market in his analysis of likely competitive injury, but the government never provided any authority that, in a case of secondary-line discrimination, there is any requirement to define a relevant market.

The district court's Order dismissing the indictment is based upon the conclusion that, "The misrepresentations by the defendants as to the 'own use' clauses in the case before the court were not material to a determination of the applicability of the NIA. By truthfully identifying themselves as a for profit institutional pharmacy, defendants did not qualify under the exemption to the Robinson-Patman Act." Pet. App. 18a-19a.

Before reaching this conclusion, the district court identified facts in the record which established that the pharmaceutical sellers' employed the "own use" clauses to seek representations that the petitioners complied with the requirements of the NIA exemption (Tr. 43, 75). The district court emphasized that the "own use" clauses, "make reference to the NIA and the *Abbott Laboratories v. Portland Retail Druggists Association, Inc.* case." Pet. App. 17a. The district court also noted that,

> It appears that the pharmaceutical companies were attempting to bring the sales to Home Care Pharmacy within the exemption created by the NIA. No other exemption has been identified which would allow the same manufacturer to sell a drug such as Accupril to Penn Plaza Pharmacy, a retail pharmacy, at one price and Home Care Pharmacy at a significantly lower price without running afoul of the Robinson-Patman Act.

Pet. App. 17a.

The district court also identified facts in the record which established that the petitioners consistently and truthfully represented that they did not comply with all of the requirements of the NIA exemption. The district court emphasized that petitioners, "stated in exhibits before the

Court that Home Care Pharmacy was a for-profit entity." Pet. App. 17a.[7]

Based upon its careful examination and interpretation of "own use" clauses in light of the facts surrounding the sale of price-discounted pharmaceutical products to Home Care Pharmacy, the organization through which the petitioners operated, the district court made the following finding of fact: "Accordingly, the Court finds that the pharmaceutical manufacturers could not have reasonably believed that sales to Home Care Pharmacy fell within the Nonprofit Institutions Act exemption." Pet. App. 8a.

After its review of the factual record, the district court agreed with petitioners' contention that, because the pharmaceutical sellers' price discrimination strategy appeared to transgress the prohibition of price discrimination in the Robinson-Patman Act, the "own use" clauses were tainted with illegality and should not be enforced, even in a criminal action for fraud. The district court further stated that, "Based on the testimony adduced at the evidentiary hearing, it appears that the pharmaceutical manufacturers were engaging in illegal price discrimination prohibited by the Robinson Patman Act." Pet. App. 18a. The district court concluded that, "the defendants cannot be held criminally liable for failing to follow through with what appears to be a scheme by the pharmaceutical manufacturers to engage in illegal price discrimination in violation of the antitrust laws." Pet. App. 20a.

5. The government appealed the dismissal of its fifteen-count indictment to the Court of Appeals for the Eighth Circuit. The government recognized that materiality is an element of

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7. The district court also relied upon the fact that, "many of the customers identified by Home Care Pharmacy as the intended recipients of these discounted pharmaceuticals were for-profit institutions who were not qualified to receive such preferential prices under the Nonprofit Institutions Act." Pet. App. 18a; Tr. 41-43; Ex. 7.

federal mail fraud, and did not challenge the district court's conclusion that all of the counts of the indictment require proof of fraud. Rather, the government argued that the Court of Appeals should disregard the district court's findings that the "own use" clauses sought representations of compliance with the NIA and that the pharmaceutical sellers appear to be engaging in a scheme of price discrimination that transgressed the Robinson-Patman Act.

On June 7, 2001, the Court of Appeals for the Eighth Circuit reversed the district court's Order dismissing the indictment. Pet. App. 1a-7a. As an initial matter, the Eighth Circuit adopted a *de novo* standard of review: "We review dismissal of an indictment for failure to state an offense *de novo*. *See United States v. Zangger*, 848 F.2d 923, 924 (8th Cir. 1988)." Pet. App. 2a.

In its opinion, the Court of Appeals supported its reversal of the district court's Order with three arguments. First, the Court of Appeals disagreed with the district court's conclusion that, because the pharmaceutical sellers' price discrimination strategy appeared to transgress the prohibition of price discrimination in the Robinson-Patman Act, the "own use" clauses were tainted with illegality and should not be enforced, even in a criminal action for fraud. The Court of Appeals declined to examine the "own use" clauses in the contracts that petitioners signed and that explicitly referred to the NIA. The Court of Appeals also declined to examine the facts surrounding the sale of price-discounted pharmaceutical products to Home Care Pharmacy, the organization through which the petitioners operated. Instead, the Court of Appeals made the general observation that,

> Determining whether a price discount will result in unlawful price discrimination requires careful analysis of difficult, often-litigated issues such as whether the discount may substantially lessen

> competition at any level of competition, whether the discount is cost justified, and whether it is granted to meet lawful competition. *See, e.g., Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 219-20 (1993).

Pet. App. 5a.

Second, the Court of Appeals disagreed with the district court's finding that petitioners' misrepresentations of "own use" were not material to the pharmaceutical sellers' determination of compliance with the NIA. Here as well, the Court of Appeals declined to examine the "own use" clauses in the contracts that petitioners signed and that explicitly referred to the NIA or, for that matter, the facts surrounding the sale of price-discounted pharmaceutical products to Home Care Pharmacy, the organization through which the petitioners operated. Rather, the Court of Appeals selected its own sources and substituted its own finding of fact:

> We know from prior cases that pharmaceutical sellers often grant discounts to institutional customers such as hospitals, health maintenance organizations, and nursing homes, *without regard to whether they are non-profit or for-profit purchasers." See* [*United States v.*] *Costanzo*, 4 F.3d [658,] 659 [(8th Cir. 1993)]; *In re Brand Name Prescription Drugs Antitrust Lit.*, 186 F. 3d 781, 783-84 (7th Cir. 1999). *See generally* LEVY, THE PHARMACEUTICAL INDUSTRY: A DISCUSSION OF COMPETITIVE AND ANTITRUST ISSUES IN AN ENVIRONMENT OF CHANGE 74-92 (FTC Bureau of Economics Staff Report, Mar. 1999). This suggests that sellers perceive other bases for justifying the discounts under the Robinson-Patman Act, and therefore that the Non-Profit Institutions Act exemption is not the

> only determining factor in making such sales. This further suggests that, even when dealing with a for-profit institutional customer, a seller may wish to know, for Robinson-Patman Act compliance purposes, whether the customer is purchasing for its "own use." In these circumstances, the materiality of an "own use misrepresentation may not be determined as a matter of law, and the district court erred in dismissing the indictment.

Pet. App. 5a-6a (emphasis in original).

Third, the Court of Appeals stated that, "The district court also erred procedurally in taking up this issue prior to trial." Pet. App. 6a. Here, the Court of Appeals relied upon *United States v. Gaudin*, 515 U.S. 506, 523 (1995), for the proposition that, in cases alleging criminal fraud, "the question of materiality must be submitted to the jury." Pet. App. 6a. The Court of Appeals stated flatly that, "Now, so long as the indictment contains a facially sufficient allegation of materiality, federal criminal procedure does not 'provide for a pretrial determination of sufficiency of the evidence.' " *Id.* (quotation and citations omitted). The Court of Appeals backtracked from this hardline position by conceding, "the *possibility* that the government's well-pleaded allegation of materiality might be so factually weak as to permit a pretrial determination that no reasonable jury could make the requisite finding of materiality." Pet. App. 7a (emphasis in original). Nonetheless, the Court of Appeals effectively followed its hardline position by concluding that,

> Whatever the theoretical possibility that such a case may arise in the future, in this case we think it clear there must be a trial on the issue of materiality at which the government may present

> pharmaceutical seller witnesses to testify as to the materiality of any "own use" misrepresentations the government is able to prove.

Id.

6. Petitioners filed a petition for rehearing and rehearing en banc on July 5, 2001. The Court of Appeals denied petitioners' petition on August 2, 2001. Pet. App. 42a. Petitioners then filed a motion for stay of mandate on August 8, 2001, and the Court of Appeals denied petitioners motion on August 16, 2001. Order denying Stay of Mandate, No. 00-2467 (8th Cir., filed August 16, 2001).

7. This petition for a writ followed.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision conflicts with one of the traditional *gatekeeper* functions of district courts that has for over a century been followed as acknowledged by this Court in *Gaudin*. The Eighth Circuit's judgment establishes a rule that effectively removes any bar to the initiation of criminal charges lacking minimal evidentiary support. Review, therefore, should be granted to prevent the irreversible harm to petitioners and others similarly situated from the abolishment of a district court's authority to review and dismiss an indictment if the government is unable to present even minimal evidence to support a necessary element of the charged offense. Absent review, petitioners will needlessly be subjected to a full-blown trial on an issue that district courts have traditionally addressed pretrial.

Additionally, the Eighth Circuit erred in failing to accord clearly erroneous deference to the district court's findings of fact in support of its ***non-materiality*** finding and dismissal of the indictment.

I. Federal Criminal Procedure Provides for Pretrial Determinations that Terminate a Proceeding before an Ultimate Determination of Guilt at Trial.

The pretrial procedure of dismissing an indictment where there is an absence of minimal evidentiary support for an element of the charge is not unique. There are other well-accepted pretrial and during-trial mechanisms for a criminal defendant to challenge the factual support that the government intends to present at trial.

For example, in a case involving possession of a controlled substance, a defendant may file a pretrial motion to suppress the physical evidence, alleging an illegal search and seizure. If granted after an evidentiary hearing, the allegedly controlled substance is "suppressed" and no evidence regarding that substance is admissible. Therefore, the necessary element of the substance itself and any analysis reflecting that it is an illicit narcotic is absent, and that element of the charged offense cannot be proven and the charge is therefore appropriately dismissed.

Similarly, if the government is unable to present evidence that an alleged misrepresentation is material, the district court has the same right and authority to dismiss an indictment prior to trial or prior to submission to the jury. For example, if it is determined as a matter of fact in a pretrial hearing that an alleged misrepresentation is not material, the *Gaudin* holding does not prohibit the district court from dismissing the indictment at that stage when the government has failed to present even minimal evidence of materiality. After all, *Gaudin* did not hold that the government had a right to have the issue of materiality determined by a jury — it held that a defendant has the right to a jury determination.

Similarly, if a "victim" admits during the government's case that an alleged misrepresentation was not material, the district

court would not only have the right — but arguably the obligation — to grant an Arrest of Judgment or a Judgment of Acquittal pursuant to Fed. R. Crim. P. 34 or 29, respectively.

The reasons for such pretrial mechanisms that allow a criminal defendant to challenge the factual support that the government intends to present at trial are patently obvious. In pretrial criminal proceedings, the trial court acts as a *gatekeeper* to prevent the government from forcing the defendant to go to a full-blown trial where the government has no factual support for a necessary element of the charged offense. Otherwise, the government could use the *in terrorem* threat of the costs and burdens of defending a full-blown trial to exact an unfair plea bargain.

The pretrial procedure used by the district court in this case is no different than the well-accepted pretrial mechanisms discussed above.[8] The petitioners demonstrated in a pretrial hearing that the government could not prove a necessary element of the charged offense with the available evidence. When granting petitioners' motion to dismiss, the district court performed its proper *gatekeeper* function and prevented the government from proceeding on a baseless claim.

Clearly, such determinations prior to trial or submission to the jury are permitted under the rules of criminal procedure and the holding in *Gaudin*. The Eighth Circuit's interpretation of *Gaudin* to the contrary is simply without merit.

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8. Like a motion to suppress, the motion to dismiss granted by the district court in this case bears no resemblance to a motion for summary judgment under Rule 56, Fed. R. Civ. P. In the criminal context, a successful motion to dismiss the indictment does not determine liability; to the contrary, unless jeopardy attaches, a new indictment against the same defendant on the same charges may issue. In the civil context, a successful motion for summary judgment does determine the ultimate issues of liability; indeed, issue and claim preclusion would prevent another civil lawsuit that raises the same issues involving the same parties.

The Eighth Circuit, however, attempted to carve out an exception to these well-accepted pretrial mechanisms, seemingly because of the particular element of the charged offense at issue:

> The district court also erred procedurally in taking up this issue [materiality] prior to trial. In *United States v. Gaudin*, 515 U.S. 506, 523 (1995), the Supreme Court held that, when materiality is an element of a criminal fraud offense, the question of materiality must be submitted to the jury. Prior to *Gaudin*, our court considered materiality to be an issue of law for the court in a criminal fraud prosecution, and we approved of the district court holding a pretrial hearing on this question and dismissing the indictment if the government failed to establish that an allegedly fraudulent statement was material. *See United States v. Bailey*, 34 F.3d 683, 687 (8th Cir. 1994), *applying United States v. Lasater*, 535 F.2d 1041 (8th Cir. 1976). After *Gaudin*, however, this procedure is no longer appropriate, because materiality is an issue for the jury.

Pet. App. 6a.

II. The Eighth Circuit's Reliance on *Gaudin* for the Proposition That a District Court Can No Longer Make a Pretrial *Non-Materiality* Determination Is Misplaced.

The Eighth Circuit rests its assertion upon this Court's opinion in *Gaudin*, and its holding that, because materiality involves underlying issues of fact, the issue of materiality should be submitted to the jury at the trial stage of proceedings when ultimate decisions of guilt are made. To the extent that the Eighth Circuit seeks to draw more far reaching implications from *Gaudin*, the Eighth Circuit's reliance on *Gaudin* is misplaced.

The *Gaudin* Court's reasoning, and its holding, are limited to the stage of criminal proceedings where issues of fact are presented to the jury for ultimate decisions of guilt. The issue in *Gaudin* did not arise in the pretrial context but, instead, at the conclusion of a trial when the judge refused to submit the question of materiality to the jury. Prior to *Gaudin*, and as cited therein at 510 n.1, some courts had held that materiality was not an issue of fact that could ever go to the jury. *E.g.*, *United States v. Gribben*, 984 F.2d 47, 51 (2d Cir. 1993) (appellate court may review pretrial hearing dismissing materiality portion of indictment because materiality is an issue of law); *United States v. Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985).

The *Gaudin* Court's reasoning does not extend to pretrial evidentiary hearings. In *Gaudin*, this Court reasoned that, because materiality involves underlying issues of fact and the defendant has a constitutional right to have the jury make ultimate decisions of guilt on every element of the charged crime, the judge may not deprive the defendant of the jury's determination of any issue of fact, including an issue of mixed law and fact. *See* 515 U.S. at 510, 513-15, 522-23. A motion to dismiss an indictment in a pretrial evidentiary hearing implicates neither the defendant's right to a jury trial or an ultimate finding of guilt. To the contrary, a motion to dismiss an indictment in a pretrial evidentiary hearing allows the district court to be a *gatekeeper* and to halt factually unfounded criminal prosecutions before the trial stage of the proceedings where the defendant's right to a jury trial and any ultimate findings of guilt come into play.

Moreover, this Court in *Gaudin* explicitly distinguished pretrial contexts that do not implicate a defendant's right to a jury's ultimate determination of guilt on each element of the charged offense. At one point, this Court parenthetically noted that, "The prosecution's failure to provide minimal evidence of materiality, like its failure to provide minimal evidence of any

other element, of course raises a question of 'law' that warrants dismissal." *Id.* at 517. This Court then cited, without criticism, to cases in which courts granted demurrers to indictments after hearing arguments pertaining to materiality.[9] This Court additionally distinguished other cases by noting that,

> some of the other cases involve the convicted *defendant's* claim that materiality should not have been decided by the jury, so that even if the issue was not one of the prosecution's failure to make a threshold case, it did not arise in a context in which the defendant's right to a jury trial was at issue.

Id. at 517. This Court then cited without criticism, to cases involving post conviction proceedings. *Id.* at 518.

Properly read, *Gaudin* provides no support for the Eighth Circuit's far reaching proposition that issues of materiality may never be addressed by a district court in a pretrial evidentiary hearing. **Properly read, *Gaudin* held that, because materiality involves underlying issues of fact, the defendant is entitled to a jury determination of materiality at the trial stage of the proceedings where the defendant's constitutional right to have the jury make ultimate decisions of guilt on every element of the charged crime is implicated.** The *Gaudin* Court did not address, and expressly distinguished, the pretrial and other contexts where the defendant's constitutional right to a jury determination does not come into play. Contrary to the Eighth Circuit's misreading, *Gaudin* did not discard the long-established and well-accepted practice that allows a defendant to seek dismissal of an indictment by showing at a pretrial evidentiary hearing that the government cannot prove one or more elements of the charged offense.

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9. *Id.* (citing *United States v. Shinn*, 14 F. 447, 452 (C.C. Ore. 1882); *United States v. Singleton*, 54 F. 488, 489 (S.D. Ala. 1892); *United States v. Bedgood*, 49 F. 54, 60 (S.D. Ala. 1891)).

III. The Eighth Circuit Erred When Reviewing *De Novo* the District Court's Factual Findings Made Pursuant to a Pretrial Evidentiary Hearing.

When selecting a standard of review, the Eighth Circuit stated, without qualification, "We review dismissal of an indictment for failure to state an offense *de novo*." Pet. App. 2a (citation omitted). The Eighth Circuit did not restrict that standard of review to the ultimate decision of the district court. Consequently, the Eighth Circuit selected the *de novo* standard of review to apply to all issues on appeal, including the district court's findings of fact.

A. While the Ultimate Conclusion of the District Court to Dismiss the Indictment is Subject to a *de novo* Review, any Findings of Fact are Entitled to Deference under the Clearly Erroneous Standard

In criminal cases, while the ultimate decision of a district court in a pretrial matter may be reviewed under a *de novo* standard, any findings of fact are reviewed under the clearly erroneous or, as it is sometimes called, the clear error standard. As this Court stated in the context of its review of a pretrial motion to suppress evidence:

> We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Ornelas v. United States, 517 U.S. 690, 699 (1996). *See also United States v. Gypsum*, 333 U.S. 364, 394-95 (1947) (applying

clearly erroneous standard of Rule 52(a), Fed. R. Civ. P., to findings of fact made without jury in criminal case).

1. The Eighth Circuit's exclusive reliance on *United States v. Zangger*, 848 F.2d 923, 924 (8th Cir. 1988), is misplaced. In *Zangger*, the defendant challenged the sufficiency of the indictment by attacking the wording of the indictment. In *Zangger*, there was no evidentiary hearing with regard to the motion to dismiss the indictment, and there were no findings of fact. Consequently, the *Zangger* court's statement of the appropriate standard of review did not need to indicate how a district court's findings of fact, after an evidentiary hearing, should be reviewed on appeal. To the same effect is the lone case that the *Zangger* court cites in support of selecting the *de novo* standard, *United States v. Given*, 767 F.2d 574, 584-85 (8th Cir.), *cert. denied*, 474 U.S. 953 (1985) (defendant attacked the wording of the indictment; no evidentiary hearing: no findings of fact).

2. The Eighth Circuit's selection of the *de novo* standard of review flies in the face of the established practice, in the Eighth Circuit and elsewhere, to review a district court's pretrial findings of fact under the clearly erroneous standard. *See generally* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 2 FEDERAL STANDARDS OF REVIEW §§ 11.10-11.14 (3d ed. 1999). Eighth Circuit opinions, in criminal cases, have consistently reviewed findings of fact in pretrial proceedings seeking dismissal of indictments under the clearly erroneous or clear error standard. *E.g.*, *United States v. Van Someren*, 118 F.3d 1214, 1216 (8th Cir. 1997) (clear error standard applied to findings of fact in motion to dismiss indictment under Speedy Trial Act); *United States v. Cardona-Rivera*, 64 F.3d 361, 363 (8th Cir. 1995) (clear error standard applied to findings of fact in motion to dismiss indictment under Speedy Trial Act); *United States v. Gomez*, 38 F.3d 1031, 1035 (8th Cir. 1994) (clearly

erroneous standard applied to finding of fact in magistrate judge's report in motion to dismiss indictment under statute of limitations); *United States v. Koory*, 20 F.3d 844, 847 (8th Cir. 1994) (clear error standard applied and substantial deference given to findings of fact, upon report and recommendation of the magistrate judge, in motion to dismiss indictment under Speedy Trial Act); *United States v. Manthei*, 979 F.2d 124, 126 (8th Cir. 1992) (clearly erroneous standard applied to findings of fact determining whether to apply Rule 16 in motion to dismiss indictment).[10]

The Eighth Circuit erred as a matter of law because the Eighth Circuit did not select the clearly erroneous standard of review for the district court's findings of fact. There is no doubt but that, in a case alleging mail fraud, materiality is an issue of fact, *United States v. Neder*, 527 U.S. 1, 25 (1999), and that, in this case, the district court, upon the Report and Recommendation of the magistrate judge after an evidentiary hearing, made a finding of fact on the issue of materiality. Pet. App. 18a-19a. Thus, the district court's finding of fact is entitled to the clearly erroneous standard of review:

> Under that standard, appellate courts will ordinarily affirm the trial court's decision unless it is not supported by substantial evidence, it evolves from an erroneous conception of the applicable law, or we are left with a firm conviction

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10. *See also United States v. Hall*, 171 F.3d 1133, 1142 (8th Cir. 1999) (clear error standard applied to findings of fact in motion to suppress); *United States v. Gipp*, 147 F.3d 680, 683 (8th Cir. 1998) (clearly erroneous standard applied to findings of fact in suppression hearing); *United States v. Redding*, 16 F.3d 298, 301 (8th Cir. 1994) (clearly erroneous standard applied to ruling on Jencks Act material); *United States v. Ware*, 890 F.2d 1008, 1011 (8th Cir. 1989) (clearly erroneous standard applied to findings of fact made in pretrial context of claim that evidence was seized in violation of Constitution).

> that a mistake has been made after having considered the entire record.

United States v. Ware, *supra*, 890 F.2d at 1011 (*quoting United States v. Wallraff*, 705 F.2d 980, 987 (8th Cir. 1983)).

B. The District Court's Findings of Fact on *Non-Materiality* Are Well-Supported by the Record

After a pretrial evidentiary hearing, the district court concluded that, "The misrepresentations by the defendants [petitioners] as to the 'own use' clauses . . . were not material to a determination of the applicability of the Nonprofit Institutions Act." Pet. App. 18a-19a.[11] Underlying this conclusion are several findings of fact, one of which is that the pharmaceutical manufacturers were seeking representations of compliance with the NIA when those manufacturers sought representations of "own use." While the district court's ultimate conclusion on materiality is subject to a *de novo* review, the district court's findings of fact are entitled to deference under the clearly erroneous standard. The record contains ample support for the findings of fact upon which the district court based its ultimate decision.

1. In making its findings of fact on materiality, the district court relied upon evidence that the pharmaceutical manufacturers sought representations that price discounted sales to the petitioners would come within the NIA exemption to the Robinson-Patman Act. This evidence consisted of the actual clauses in the contracts by which the pharmaceutical manufacturers sought "own use" representations. Three of these

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11. *See also id.* ("This Court finds that no reasonable mind could find that the misrepresentations defendants [petitioners] made with respect to the own use clauses were material to the pharmaceutical manufacturers in determining whether sales to Home Care Pharmacy came within the requirements of the Nonprofit Institutions Act.")

clauses are set forth in the district court's opinion. Pet. App. 12a-15a. Each clause uses the words "own use," words that are found in the NIA and that define one of three requirements of the exemption. 15 U.S.C. § 13c. *See also Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1, 13-18 (1976) (discussing "own use" requirement). In each clause, the words "own use" appear in quotations, and the words "own use" are defined by explicit reference to the NIA, caselaw that construes the NIA, or both. From this evidence, the district court found that, "It appears that the pharmaceutical companies were attempting to bring the sales to Home Care Pharmacy within the exemption created by the Nonprofit Institutions Act." Pet. App. 17a.

2. In making its findings of fact on materiality, the district court relied upon evidence that the pharmaceutical manufacturers needed to bring their price-discounted sales within an exemption to the Robinson-Patman Act. 15 U.S.C. § 13. This evidence consists of facts introduced through one of petitioners' expert witnesses. These facts included evidence on each and every one of the elements of a prima facie case of secondary-line price discrimination.[12] These facts also included evidence on each and every one of the affirmative defenses found in the Robinson-Patman Act.[13] Petitioners' expert also addressed functional discounts and functional availability, concepts that are not so much affirmative defenses but ways to negate a finding of price differences, the first element of a prima facie case.[14] Much of this evidence was cited by the district court in its opinion. From this evidence, the district court found that the drug manufacturers needed to bring their price discrimination

12. Tr. 18, 21, 29 (price difference); Tr. 29 (two buyers from same seller); Tr. 28, 29 (commodities); Tr. at 29 (like grade and quantity); Tr. 28-29, 35 (competitive injury).

13. Tr. 30-32, 35-36.

14. Tr. 30.

strategy within an exemption to the Robinson-Patman Act. This much necessarily follows from the district court's statement that,

> No other exemption [other than the Nonprofit Institutions Act] has been identified which would allow the same manufacturer to sell a drug such as Accupril to Penn Plaza Pharmacy, a retail pharmacy, at one price and Home Care Pharmacy at a significantly lower price without running afoul of the Robinson-Patman Act.

Pet. App. 17a.

3. In making its findings of fact on materiality, the district court relied upon evidence that the petitioners truthfully and consistently represented that they did not comply with the NIA. One of the three requirements of the NIA is that the price-favored purchaser is "not operated for profit." 15 U.S.C. § 13c. *See also DeModena v. Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388, 1390-91 (9th Cir. 1984) (discussing "not operated for profit" requirement), *cert. denied*, 469 U.S. 1229 (1985). Evidence again taken from the actual contracts and cited by the district court demonstrates that the petitioners truthfully and consistently represented that they operated through a for profit entity. Pet. App. 12a-13a, 15a, 17a-19a. Evidence also showed that the petitioners resold pharmaceutical products to for profit nursing homes. Pet. App. 15a. From this evidence, the district court found that, "By truthfully identifying themselves as a for profit institutional pharmacy, defendants [petitioners] did not qualify under the [NIA] exemption to the Robinson-Patman Act." Pet. App. 19a.

These factual findings are not only well-supported in the record, but they amply support the district court's ultimate conclusion that, "The misrepresentations by the defendants

[petitioners] as to the 'own use' clauses . . . were not material to a determination of the applicability of the Nonprofit Institutions Act." Pet. App. 18a-19a. The drug manufacturers used the contract clauses to obtain representations that price-discounted sales to petitioners would come within the NIA, an exemption to the Robinson-Patman Act. Evidence showed that the manufacturers needed to bring price-discounted sales within an exemption to the Robinson-Patman Act because evidence showed that the price discrimination strategy otherwise was in violation of the Robinson-Patman Act. The "own use" misrepresentations were not material to the drug manufacturers' determination of the applicability of the NIA because the petitioners truthfully and consistently represented that they did not comply with the NIA.[15]

C. Even If *De Novo* Review Applies, the Eighth Circuit Improperly Ignored the Record, Selected Its Own Sources, and Made Its Own Findings of Fact.

Even if *de novo* review applies, the Eighth Circuit erred by not applying that standard to the facts in the record upon which the district court based its finding of fact on materiality. It is important to point out that, after the case had been submitted to the Eighth Circuit but before the panel rendered its opinion, the panel requested the entire record from the district court. 8th Cir. Docket 00-2467, 3/30/01. Thus, any failure by the panel

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15. Although not strictly necessary to its ultimate conclusion on materiality, the district court used these findings of fact to address petitioners' policy argument that criminal sanctions should not be applied in a case where the own use clauses were integral to illegal price discrimination and where petitioners' conduct in failing to adhere to those clauses furthered the competition goals of the antitrust laws. Here, the district court stated that it agreed "that defendants cannot be held criminally liable for failing to follow through with what appears to be a scheme by the pharmaceutical manufacturers to engage in illegal price discrimination in violation of the antitrust laws." Pet. App. 20a.

to appreciate the facts in the record that support the district court's finding of fact on the issue of materiality cannot be excused. The panel had the entire record and, thus, the opportunity and obligation to review the entire record before rendering its opinion.

1. Nowhere does the Eighth Circuit evaluate, under any standard of review, the finding of fact on the issue of materiality, set forth above, that was made by the magistrate judge and adopted by the district court. The Eighth Circuit simply ignores crucial and relevant facts, including facts specifically identified in the district court's opinion, which indicate that the district court's finding of fact on the issue of materiality is well supported. For example, the Eighth Circuit does not mention the "own use" clauses in the record which explicitly refer to the NIA or to controlling caselaw that interprets the NIA. Nor does the Eighth Circuit refer to that part of the opinion letter and testimony of petitioners' expert which, fairly read, indicates that, on the basis of the facts introduced at the hearing and in light of analysis under the Robinson-Patman Act, the logical inference is that the pharmaceutical sellers employed "own use" clauses to obtain representations that prospective purchasers qualified for price discounts under the NIA. (Tr. 32, 36-37). These and other glaring omissions clearly indicate that the Eighth Circuit blatantly disregarded any aspect of the record that might demonstrate the compelling support for the district court's findings of fact.

Perhaps an even more glaring deficiency derives from the Eighth Circuit's willingness to go outside of the record by making factual inferences from two dissimilar cases and a differently focused FTC study. In this regard, even a casual review of the record in this case discloses a stark contrast between the factual record developed in the district court and the factual inferences that are made by the Eighth Circuit. In the district court, the record included, not only general

evidence of business practices in the pharmaceutical industry, but also specific facts pertaining to the allegations in the indictment that was properly dismissed. For example, many of the contracts at issue were introduced into evidence as well as facts about the operations of the two, geographically proximate pharmacies operated by the petitioners, Tr. 17, 22-23, one of which was a retail establishment that did not receive price discounts and one of which received significant discounts (Tr. 8-10, 16-17, 21-23, Ex. 12). Facts were also introduced about the customers to whom petitioners sold price-discounted pharmaceuticals, including the appellees' truthful representations to the sellers as well as publically available documents from which the sellers could have easily obtained information about those customers. Tr. 41-43, Ex. 7.

In stark contrast, the Eighth Circuit barely ventures into the record to discuss the facts upon which the district court based its opinion. The Eighth Circuit does characterize the allegations of the indictment, Pet. App. 1a-3a, and the legal theories presented by the parties, Pet. App. 3a-4a. The Eighth Circuit also indicates that the appellees represented that they operated through a for-profit company. Pet. App. 4a. Beyond that, however, the Eighth Circuit completely ignores any specific facts pertaining to the allegations in the indictment at issue *in this case* or, for that matter, the allegedly criminal conduct of the appellees *in this case*.

2. Instead, the Eighth Circuit looked to two dissimilar cases and a differently focused FTC study for factual inferences to support the indictment. Pet. App. 4a-6a. Petitioners do not disagree if the Eighth Circuit means to infer from these sources that, in the pharmaceutical industry, there is a practice of differential pricing in which some sellers do not always distinguish whether price-favored purchasers operate non-profit or for-profit. The problem, however, is that the indictment did not charge the petitioners with practices in which some

pharmaceutical sellers may engage. The practice of differential pricing cited by the Eighth Circuit is of consequence only if factual characteristics of the business practices disclosed in the supporting citations have some relevance to the materiality of the "own use" clauses *in this case*. If this is its line of reasoning, the Eighth Circuit's opinion not only manifests a lack of logic and clear thinking, but also a patent misunderstanding of the sources upon which it relies.

The problem with the Eighth Circuit's line of reasoning is that the sources cited in support of an industry practice provide no support, factual or otherwise, for the Eighth Circuit's rather remarkable leap of logic to the conclusion that, in addition to seeking representations of compliance with the NIA, and "even when dealing with a for-profit customer, a seller may wish to know, for Robinson-Patman Act compliance purposes, whether the customer is purchasing for its 'own use.' " Pet. App. 6a. In effect, the Eighth Circuit asserts that, because there are lots of reasons why pharmaceutical sellers routinely employ "own use" clauses to comply with the Robinson-Patman Act, the government must be allowed to go to trial and show the specific reason why the pharmaceutical sellers *in this case* employed "own use" clauses. Because this reasoning is central to the Eighth Circuit's decision, *see* Pet. App. 5a-7a, the sources upon which the inference are based deserve close scrutiny.

The first source cited by the Eighth Circuit in support of its opinion was *United States v. Costanzo*, 4 F.3d 658, 659 (8th Cir. 1993). Pet. App. 5a. The *Costanzo* opinion examined an "own use" clause that made no reference to the Robinson-Patman Act or to any of its exemptions. There is simply no credible basis to cite *Costanzo* for the proposition that there are lots of reasons why pharmaceutical sellers routinely employ "own use" clauses for Robinson-Patman compliance purposes.

The second source cited by the Eighth Circuit was *In re Brand Names Prescription Drugs Antitrust Lit.*, 186 F.3d 781, 783-84 (7th Cir. 1999). Pet. App. 5a. That opinion, however, only addressed antitrust conspiracy issues under Section 1 of the Sherman Act, 15 U.S.C. § 1. Not only was there no discussion of "own use" clauses, there was no discussion of the Robinson-Patman Act or the NIA.

The third source cited by the Eighth Circuit cites was an FTC study, ROY LEVY, THE PHARMACEUTICAL INDUSTRY: A DISCUSSION OF COMPETITIVE AND ANTITRUST ISSUES IN AN ENVIRONMENT OF CHANGE 74-92 (FTC Bureau of Economics Staff Report, Mar. 1999). Pet. App. 5a. That study focused, not upon Robinson-Patman price discrimination, but upon economic price discrimination. *Id.* at 75 n.166.

Thus, in support of its remarkable proposition that there are lots of reasons why sellers employ "own use" clauses to comply with the Robinson-Patman Act, the Eighth Circuit cited three authorities that discuss, at best, business reasons to discriminate in price. Not one authority, however, examines whether a business practice offends the Robinson-Patman Act, much less whether there is any need for compliance. Only one authority, *Costanzo*, identifies an "own use" clause, but that case never discusses compliance with the Robinson-Patman Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JUNE 7, 2001

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-2467

United States of America,

Plaintiff – Appellant,

v.

Louie A. Ferro, Jr.; Louie A. Ferro, Sr.; Wilbur Swift; Kevin D. Staley,

Defendants – Appellees.

Submitted: January 9, 2001

Filed: June 7, 2001

Before LOKEN, HEANEY, and BYE, Circuit Judges.

LOKEN, Circuit Judge.

The government appeals the dismissal of its fifteen-count indictment against Louie A. Ferro, Jr., Louie A. Ferro, Sr., Wilbur Swift, and Kevin D. Staley (collectively referred to as "defendants"). The indictment charged defendants with mail fraud, transporting fraudulently obtained pharmaceuticals in interstate commerce, money laundering, and conspiring to commit these offenses in violation of 18 U.S.C. §§ 371, 1341, 1956(a)(1)(A), 1956(h), and 2314.

Appendix A

All the offenses are based upon the government's allegation that defendants defrauded various pharmaceutical sellers into granting substantial discounts by misrepresenting that defendants were purchasing for the "own use" of the Ferros' institutional pharmacy or its customers. The district court dismissed the indictment for failure to state an offense, finding the "own use" misrepresentations to be immaterial as a matter of law.[1] We review dismissal of an indictment for failure to state an offense *de novo*. *See United States v. Zangger*, 848 F.2d 923, 924 (8th Cir. 1988). We reverse and reinstate the indictment.

The indictment alleges that Home Care Pharmacy ("HCP"), a for-profit institutional pharmacy owned by the Ferros, purchased pharmaceuticals at substantial discounts by misrepresenting to pharmaceutical sellers that HCP was buying for its "own use," or for the "own use" of its nursing home customers. Contrary to these representations, HCP then resold the majority of the discounted pharmaceuticals to various commercial wholesalers. Defendant Swift was associated with one of the wholesalers that purchased discounted pharmaceuticals from HCP. Defendant Staley managed the operations of FKC, Inc., a wholesale company established by the Ferros to assist in distributing the discounted pharmaceuticals. The indictment alleges that

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1. In *Neder v. United States*, 527 U.S. 1, 25 (1999), the Supreme Court held that materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes. The government concedes it must prove material misrepresentations to convict defendants of the three mail fraud counts. The government does not challenge the district court's conclusion that all the remaining counts of the indictment require proof of mail fraud.

defendants resold in excess of $10 million worth of discounted pharmaceuticals between May 1995 and January 1999.

Defendants moved to dismiss the indictment for failure to state an offense. They did not argue that the indictment fails to allege the elements of a mail fraud offense, including materiality, or that it fails to adequately inform them of the charges they must defend — the typical grounds for challenging the sufficiency of an indictment. *See, e.g., Hamling v. United States*, 418 U.S. 87, 117 (1974). Rather, defendants argued that the alleged "own use" misrepresentations to pharmaceutical sellers were immaterial as a matter of law, and that the sellers were engaged in Robinson-Patman Act violations that should insulate defendants from charges of criminal fraud. A brief review of federal price discrimination law and pricing practices in the pharmaceutical industry is necessary to an understanding of these issues.

The Robinson-Patman Act makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality ... where the effect of such discrimination may be substantially to lessen competition." 15 U.S.C. § 13(a). The Non-Profit Institutions Act exempts from the Robinson-Patman Act goods purchased "for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." 15 U.S.C § 13c. The complex question of "own use" was addressed in detail by the Supreme Court in *Abbott Laboratories v. Portland Retail Druggists Association*, 425 U.S. 1, 14 (1976). The Court concluded its opinion by cautioning that a pharmaceutical seller who "seeks to enjoy ... the benefits provided by § 13c" should "routinely

obtain[ ] a representation from its hospital customer as to the use of the products purchased." 425 U.S. at 21.

Pharmaceutical sellers grant deep discounts to non-profit customers who provide "own use" certifications. Like any two-tiered pricing system, this gives purchasers who qualify for the discounted prices an incentive to create a "diversion market" in which they resell pharmaceuticals purchased at a discount in competition with pharmacies and other retailers who purchased at much higher wholesale prices. *See generally United States v. Costanzo*, 4 F.3d 658, 659-60 (8th Cir. 1993); *United States v. Weinstein*, 762 F.2d 1522, 1533 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986) (export diversion market). The government's theory is that defendants purchased pharmaceuticals at unwarranted discounts by making "own use" misrepresentations and then resold those products in the diversion market.

Defendants moved to dismiss on the following theory: pharmaceutical sellers seek "own use" representations for the sole purpose of determining whether a prospective purchaser qualifies for the Non-Profit Institutions Act exemption and therefore may be granted a price discount free of Robinson-Patman Act compliance concerns. The exemption is limited to non-profit organizations, and HCP disclosed to sellers that it was a for-profit company. Because sellers knew that sales to HCP were not exempt under the Non-Profit Institutions Act, any "own use" misrepresentations were immaterial to their decisions to sell at discounted prices. The discounts simply reflected the sellers' intentional Robinson-Patman Act violations; no fraud occurred.

Though the district court accepted this theory, we conclude it is seriously flawed. The critical flaw is defendants' assumption that a price discount on pharmaceuticals is either exempt from the Robinson-Patman Act, or it is unlawful.[2] To the contrary, the Act does not declare all non-exempt price differentials unlawful. Determining whether a price discount will result in unlawful price discrimination requires careful analysis of difficult, often-litigated issues such as whether the discount may substantially lessen competition at any level of competition, whether the discount is cost justified, and whether it is granted to meet lawful competition. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 219-20 (1993).

We know from prior cases that pharmaceutical sellers often grant discounts to institutional customers such as hospitals, health maintenance organizations, and nursing homes, *without regard to whether they are non-profit or for-profit purchasers. See Costanzo*, 4 F.3d at 659; *In re Brand Name Prescription Drugs Antitrust Lit.*, 186 F.3d 781, 783-84 (7th Cir. 1999). *See generally* LEVY, THE PHARMACEUTICAL INDUSTRY: A DISCUSSION OF COMPETITIVE AND ANTITRUST ISSUES IN AN ENVIRONMENT OF CHANGE 74-92 (FTC Bureau of Economics Staff Report, Mar. 1999). This suggests that sellers perceive other bases for justifying the discounts under the Robinson-Patman Act, and therefore that the Non-Profit

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2. Defendants' materiality theory was presented to the district court by Dennis S. Corgill, Associate Professor of Law at Widener University. The record before us contains no foundation for the extraordinary legal opinions offered by this witness, opinions that would find little or no support in Robinson-Patman Act treatises and judicial opinions.

Institutions Act exemption is not the only determining factor in making such sales. This further suggests that, even when dealing with a for-profit institutional customer, a seller may wish to know, for Robinson-Patman Act compliance purposes, whether the customer is purchasing for its "own use." In these circumstances, the materiality of an "own use" misrepresentation may not be determined as a matter of law, and the district court erred in dismissing the indictment.

The district court also erred procedurally in taking up this issue prior to trial. In *United States v. Gaudin*, 515 U.S. 506, 523 (1995), the Supreme Court held that, when materiality is an element of a criminal fraud offense, the question of materiality must be submitted to the jury. Prior to *Gaudin*, our court considered materiality to be an issue of law for the court in a criminal fraud prosecution, and we approved of the district court holding a pretrial hearing on this question and dismissing the indictment if the government failed to establish that an allegedly fraudulent statement was material. *See United States v. Bailey*, 34 F.3d 683, 687 (8th Cir. 1994), applying *United States v. Lasater*, 535 F.2d 1041 (8th Cir. 1976). After *Gaudin*, however, this procedure is no longer appropriate, because materiality is an issue for the jury. Now, so long as the indictment contains a facially sufficient allegation of materiality, federal criminal procedure does not "provide for a pre-trial determination of sufficiency of the evidence." *United States v. Critzer*, 951 F.2d 306, 307-08 (11th Cir. 1992). As the Third Circuit said in *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000):

> In civil cases, of course, the summary judgment procedures contemplated by Federal Rule of Civil Procedure 56 may be utilized to test, pretrial, the

> sufficiency of the evidence to establish triable issues of fact; but there is no corollary in criminal cases. The government is entitled to marshal and present its evidence at trial, and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29.... [W]e simply cannot approve dismissal of an indictment on the basis of predictions as to what the trial evidence will be.

We acknowledge that an occasional case, such as *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998), has recognized the *possibility* that the government's well-pleaded allegation of materiality might be so factually weak as to permit a pretrial determination that no reasonable jury could make the requisite finding of materiality. But defendants have cited no decision since *Gaudin* in which a federal fraud indictment was dismissed on this ground prior to trial. Whatever the theoretical possibility that such a case may arise in the future, in this case we think it clear there must be a trial on the issue of materiality at which the government may present pharmaceutical seller witnesses to testify as to the materiality of any "own use" misrepresentations the government is able to prove.

The judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED MAY 8, 2000

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 99-00180-01/04-CR-W-SOW

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOUIE A. FERRO, JR., LOUIE A. FERRO, SR., WILBUR SWIFT, KEVIN D. STALEY,

Defendants.

ORDER

Before the Court is the Report and Recommendation of United States Magistrate Judge Sarah W. Hayes regarding defendants' Joint Motion to Dismiss Indictment for Failure to State an Offense (Doc. #51). For the reasons stated herein, defendants' motion is granted.

I. *Background*

The Grand Jury returned a fifteen count indictment against Louie A. Ferro, Jr., Louie A. Ferro, Sr., Wilbur Swift,

and Kevin D. Staley on July 14, 1999. In Count One of the indictment, all four defendants are charged with having knowingly conspired to transport property of a value of $5,000 or more obtained by fraud across state lines and with having used the United States mails and private and commercial interstate carriers to execute a scheme and artifice to defraud from May of 1995 through January of 1999 in violation of 18 U.S.C. § 371. Count Two of the indictment alleges that defendants Ferro, Jr., Ferro, Sr., and Swift knowingly conspired to commit money laundering in violation of 18 U.S.C. § 1956(a)(1)(A) by conducting financial transactions including, but not limited to, depositing checks which represented the proceeds of the unlawful activity charged in Count One in violation of 18 U.S.C. § 1956(h).

Counts Three through Seven charge defendants Ferro, Jr., Ferro, Sr., and Swift with the interstate transportation of pharmaceutical goods of a value of $5,000 or more, knowing those goods to have been obtained by fraud in violation of 18 U.S.C. § 2314. Counts Eight and Nine charge all four defendants with the interstate transportation of pharmaceutical goods of a value of $5,000 or more, knowing those goods to have been obtained by fraud in violation of 18 U.S.C. § 2314. Counts Ten through Twelve allege that all four defendants committed mail fraud in violation of 18 U.S.C. § 1341. Counts Thirteen and Fourteen charge defendants Ferro, Jr., Ferro, Sr., and Swift with conducting financial transactions, specifically the depositing of checks which represented the proceeds of the unlawful activity alleged in Counts Three through Five, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 2. Finally, Count Fifteen

seeks forfeiture of property from defendants Ferro, Jr., Ferro, Sr., and Swift.

On October 15, 1999, defendants filed a Joint Motion to Dismiss Indictment (Doc. #51) arguing that the alleged contracts referenced in the Indictment were void as against public policy as said contracts attempted to engage in price discrimination prohibited by the Robinson-Patman Act, 15 U.S.C. § 13. Defendants contended that their alleged acts of not complying with the "own use" clauses in these contracts supported public policy, were not a scheme to defraud, and were beyond the outer limits of the mail fraud statute. The government opposed defendants' motion, taking the position that the issue of whether or not the pricing restrictions violated the antitrust laws was irrelevant in a criminal prosecution.

The United States Magistrate Judge conducted an evidentiary hearing on defendants' motion on November 23, 1999, and subsequently issued a Report and Recommendation suggesting that defendants' motion should be granted. This Court agrees.

II. *Findings of Facts*

1. Defendant Louie Ferro, Jr., owns and operates Ferro Pharmacy, Inc., d/b/a/ Penn Plaza Pharmacy, which is a retail outlet for pharmaceutical drugs. (Tr. 12-13, 22; Defendants' Ex. 3).[1] Defendant Ferro, Jr., along with his father, defendant Louie Ferro, Sr., also owned and operated an institutional

1. "Tr." refers to the evidentiary hearing transcript of November 23, 1999.

pharmacy called Home Care Pharmacy. (Tr. 12, 22; Defendants' Ex. 3). Home Care Pharmacy receives its products at discounted prices and then sells those products to both nursing homes and other wholesalers not associated with nursing homes. (Tr. 13).

2. The manufacturers of pharmaceutical products follow a practice of selling their products in two different channels and at two different prices. (Tr. 16-17). One channel of distribution is called a "closed door" channel because once the purchaser receives the pharmaceutical products, its doors are closed to any sale in competition with the manufacturer. (Tr. 16). Manufacturers sell at a low price in the "closed door" channel. (Tr. 17). An example of a "closed door" channel would be a pharmacy in a not-for-profit hospital where the pharmacy only dispenses drugs to people who are patients in the hospital and would not sell them to walk-in customers or others; their doors are closed to any customers who might come in from the outside. (Tr. 16-17).

3. The other channel of distribution is the "open door" channel. (Tr. 17). In this channel, once the purchaser receives the pharmaceutical products, its doors are open to any customer who may walk in. (Tr. 17). Manufacturers sell their pharmaceutical products at a higher price in the "open door" channel. (Tr. 17). An example of an "open door" channel would be a retail pharmacy. (Tr. 17).

4. Penn Plaza Pharmacy is in the "open door" channel and pays more for pharmaceutical products than Home Care Pharmacy, which is in the "closed door" channel, pays for the same products. (Tr. 21-23). One example is a drug called

Accupril for which Home Care Pharmacy is charged $38.18 and Penn Plaza Pharmacy is charged $73.75 by the same manufacturer. (Tr. 22; Defendants' Ex. 12).

5. In the pharmaceutical industry, there is a diversion market in which purchasers of pharmaceutical products receive those products at a discounted price, either for export or purportedly under the exemption created by the Nonprofit Institutions Act, and then resell them to others at a higher price. (Tr. at 16).

6. Home Care Pharmacy completed an application for membership to GeriMed a purchasing organization for the "closed door" distribution channel of pharmaceutical products. (Defendants' Ex. 3). In connection with that application, Home Care Pharmacy completed a credit application for Baxter Healthcare Corp., a pharmaceutical manufacturer, in which Home Care Pharmacy stated that it intended to resell goods purchased from Baxter and that it was a "Profit Corp." (Defendants' Ex. 4B).

7. In the Contract Eligibility Certification Forms completed for Knoll Pharmaceutical Company, Home Care Pharmacy identified itself as a "for profit" entity. (Defendants' Exs. 4D and 6). Defendant Louie Ferro, Jr., wrote "N/A" next to a paragraph stating that the company was an eligible institution under the Non Profit Institutions Act, 15 U.S.C. § 13c. (Defendants' Ex. 4D). The forms further provided:

> Home care Pharmacy certifies that although it is not a non-profit institution within the meaning of the Non Profit Institutions Act, pharmaceuticals

> purchased at contract pricing are for Home Care Pharmacy's "own use," as defined in *DeModena, et al. v. Kaiser Foundation Health Plan, Inc., et al.*, 743 F.2d 13888 [sic] (9th Cir. 1984) applying the holding of the U.S. Supreme Court in *Abbott Laboratories, et al. v. Portland Retail Druggist Association, Inc.*, 425 U.S. 1 (1976).

(Defendants' Exs. 4D and 6).

8. In the Boehringer Ingelheim Pharmaceuticals, Inc. Account Application and Account Application Questionnaire, Home Care Pharmacy stated that it was "For Profit." (Defendants' Exs. 5 and 5A). Another form for Boehringer Ingelheim, an Alternate Care Certification, provided: "I further certify that pharmaceuticals will be sold or dispensed only to members of this facility and only for the facility's 'own use' within the meaning of 15 USC 13C (52 Stat. 446)." (Defendants' Ex. 5).

9. Home Care Pharmacy's Agreement with GeriMed recognized that Home Care Pharmacy "is a for-profit organization." (Defendants' Ex. 4A). The Agreement for Use of GeriMed Program Contract provided, in part:

> I certify that the above-named Client [Home Care Pharmacy] is not engaged in retail sales and that all items purchased through the GeriMed Program will be utilized consistent with the established guidelines based on [sic] United States Supreme Court decision in Abbott Laboratories, et al., vs. Portland Retail Druggists Association, et al.

Appendix B

As used herein, any and all merchandise purchased under this program shall be for our own use. The phrase "own use" is limited to the following:

1. Dispensing of the product to inpatients or emergency patients for treatment at the facilities serviced by the client.

2. Dispensing of the product to former patients upon their discharge as take-home prescriptions or supplies necessary for a limited time and reasonable time as continuation of treatment;

3. Dispensing of the product to Client employees or employees of the facilities serviced by the Client for their own use or the use of their dependents (but not for the use of their non-dependent family members); or

4. Dispensing of the product to a staff member physician in a facility serviced by the Client for his or her personal use, or for the use of his or her dependents (but not other persons or for use in the physician's private practice).

I further represent and warrant that this Pharmacy shall not buy, distribute, sell, transfer, or use contract bid priced products or cause the distribution of bid priced products in any manner

> contrary to the requirements of "own use" or any terms and conditions contained in this document.

(Defendants Ex. 4A).

10. Defendants' Exhibit 7 lists the facilities serviced by Home Care Pharmacy. Of the twenty-two facilities named in the exhibit, twenty-one are listed as being for-profit entities.

11. Professor Dennis S. Corgill, Associate Professor of Law at Widener University testified at the evidentiary hearing that economic theory teaches that a manufacturer can increase profits and sell more product if it engages in price discrimination. (Tr. 24). First, the manufacturer must segregate its customers into two groups. (Tr. 24). Next, the manufacturer must prevent arbitrage, the practice by which someone would receive products at a low price, but then sell those products to a customer from whom the manufacturer would have been able to receive a higher price. (Tr. 25).

12. Professor Corgill testified that pharmaceutical products are considered commodities for purposes of the Robinson-Patman Act. (Tr. 28).

III. *Discussion*

The charges against the defendants in this case stem from an underlying premise that defendants defrauded pharmaceutical manufacturers by signing contracts containing "own use" clauses in which they represented that the discounted pharmaceutical products would be dispensed only for nursing home patients and then selling those products to commercial wholesalers. Defendants claim, however, that

these contracts were void as against public policy because the drug manufacturers were engaging in illegal price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13.

The Robinson-Patman Act prohibits persons engaged in commerce from discriminating in prices between purchasers of goods of like grade, quality, and quantity. 15 U.S.C. § 13.[2] There is an exemption to the Robinson-Patman Act, known as the Nonprofit Institutions Act, for sales of supplies to non-profit institutions which purchase products for their own use. 15 U.S.C. § 13c. The "exemption provision of the Nonprofit Institutions Act is a limited one." *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1, 14 (1976).

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2. The Act provides, in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

15 U.S.C. §§ 13(a) and (f).

Appendix B

With respect to the contracts at issue in this case, the pharmaceutical manufacturers have the burden of establishing that a transaction falls within the exemption of the Nonprofit Institutions Act because it is the manufacturers who enjoy the benefit of the exemption. *Abbott Laboratories*, 425 U.S. at 21. In order to satisfy this burden, (1) the manufacturers must identify the purchaser as a nonprofit institution and (2) the manufacturers must routinely obtain a representation from the nonprofit institutional customer as to the use of the purchased products. *Id.* at 21; *Rudner v. Abbott Laboratories*, 664 F. Supp. 1100, 1103-1104 (N.D. Ohio 1987).

Although the government argues that the applicability of the Nonprofit Institutions Act is irrelevant in this case, the documents which form the basis for the fraud charges against defendants indicate otherwise. Several of the documents completed by the defendants make reference to the Nonprofit Institutions Act and the *Abbott Laboratories v. Portland Retail Druggists Association, Inc.* case. It appears that the pharmaceutical companies were attempting to bring the sales to Home Care Pharmacy within the exemption created by the Nonprofit Institutions Act. No other exemption has been identified which would allow the same manufacturer to sell a drug such as Accupril to Penn Plaza Pharmacy, a retail pharmacy, at one price and Home Care Pharmacy at a significantly lower price without running afoul of the Robinson-Patman Act.

Once defendant Louie Ferro, Jr., stated in the exhibits before the Court that Home Care Pharmacy was a for-profit entity, there was no basis for the drug manufacturers to sell to Home Care Pharmacy at a lower price than other retail

pharmacies. Furthermore, many of the customers identified by Home Care Pharmacy as the intended recipients of these discounted pharmaceuticals were for-profit institutions who were not qualified to receive such preferential prices under the Nonprofit Institutions Act.

Accordingly, the Court finds that the pharmaceutical manufacturers could not have reasonably believed that sales to Home Care Pharmacy fell within the Nonprofit Institutions Act exemption. There was no basis for the pharmaceutical manufacturers to sell to Home Care Pharmacy at a reduced price. Based upon the testimony adduced at the evidentiary hearing, it appears that the pharmaceutical manufacturers were engaging in illegal price discrimination prohibited by the Robinson-Patman Act.

The government has relied on *United States v. Weinstein* throughout these proceedings. 762 F.2d 1522 (11th Cir. 1985). In *Weinstein*, however, the defendants were charged with conspiracy to defraud pharmaceutical manufacturers because they represented to the manufacturers that they were nonprofit organizations or were going to export the pharmaceuticals in order to obtain discounted prices. *Id.* at 1526-1527. By its terms, the Robinson-Patman Act does not cover sales of goods for export. 15 U.S.C. § 13(a). Therefore, the representations by the defendants in *Weinstein* were material to a determination by the pharmaceutical manufacturers regarding whether sales to the defendants at discounted prices would violate the Robinson-Patman Act.

The misrepresentations by the defendants as to the "own use" clauses in the case before the Court were not material

to a determination of the applicability of the Nonprofit Institutions Act. By truthfully identifying themselves as a for-profit institutional pharmacy, defendants did not qualify under the exemption to the Robinson-Patman Act.

While issues of materiality are normally reserved for a jury, where no reasonable mind could find a statement material, the trial court may decide the issue of materiality. *See United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998). The Court finds that no reasonable mind could find that the misrepresentations defendants made with respect to the own use clauses were material to the pharmaceutical manufacturers in determining whether sales to Home Care Pharmacy came within the requirements of the Nonprofit Institutions Act.

Furthermore, the government cannot satisfy other requirements for a fraud claim as a matter of law. By definition, a fraud is "an intentional or deliberate misrepresentation of the truth for the purpose of inducing another, in reliance on it, to part with a thing of value or to surrender a legal right." Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, Federal Jury Practice and Instructions § 16.08 (5th ed. 2000). Defendants did not induce the pharmaceutical manufacturers to part with anything to which they had a legitimate right. Under Missouri law, contract provisions which violate the law are illegal and unenforceable. *See Grannemann v. Columbia Ins. Group*, 931 S.W.2d 502, 506 (Mo.App. 1996).

While the exhibits before the Court indicate that Home Care Pharmacy deceived the pharmaceutical manufacturers

into believing that it would not resell the products to wholesalers, the Court agrees with the Magistrate Judge that defendants cannot be held criminally liable for failing to follow through with what appears to be a scheme by the pharmaceutical manufacturers to engage in illegal price discrimination in violation of the antitrust laws.

IV. *Conclusion*

Accordingly, for the reasons set forth above, it is hereby

ORDERED that defendants' Joint Motion to Dismiss Indictment for Failure to State an Offense (Doc. #51) is granted.

s/ Scott O. Wright
Judge Scott O. Wright

Date: MAY 08 2000

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED FEBRUARY 8, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 99-00180-01/04-CR-W-SOW

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOUIE A. FERRO, JR., LOUIE A. FERRO, SR.,
WILBUR SWIFT, and KEVIN D. STALEY,

Defendants.

REPORT AND RECOMMENDATION

This matter is currently before the Court on Defendants' Joint Motion to Dismiss Indictment for Failure to State an Offense (doc #51). For the reasons set forth below, it is recommended that this motion be granted.

I. *INTRODUCTION*

A. *The Indictment*

On July 14, 1999, the Grand Jury returned a fifteen count indictment against Louie A. Ferro, Jr., Louie A. Ferro, Sr.,

Appendix C

Wilbur Swift and Kevin D. Staley. Count One of the indictment charges that from May 1995 to January 1999, defendants Ferro, Jr., Ferro, Sr., Swift and Staley knowingly conspired with each other and others to transport property of a value of $5,000 or more obtained by fraud across state lines and to use the United States mails and private and commercial interstate carriers to execute a scheme and artifice to defraud, all in violation of 18 U.S.C. § 371. Count Two charges that from July 1996 to December 1998, defendants Ferro, Jr., Ferro, Sr., and Swift knowingly conspired with each other to commit money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) by conducting financial transactions, including, but not limited to, the depositing of checks, which deposits represented the proceeds of a specified unlawful activity as defined 18 U.S.C. § 1956, that is, interstate transportation of property of a value of $5,000 or more obtained by fraud and mail fraud in violation of 18 U.S.C. §§ 2314 and 1341, all in violation of 18 U.S.C. § 1956(h). Counts Three through Seven charge defendants Ferro, Jr., Ferro, Sr., and Swift with the interstate transportation of pharmaceutical goods of a value of $5,000 or more, knowing the same to have been obtained by fraud, in violation of 18 U.S.C. § 2314. Counts Eight and Nine charge defendants Ferro, Jr., Ferro, Sr., Swift and Staley with the interstate transportation of pharmaceutical goods of a value of $5,000 or more, knowing the same to have been obtained by fraud, in violation of 18 U.S.C. § 2314. Counts Ten through Twelve charge defendants Ferro, Jr., Ferro, Sr., Swift and Staley with mail fraud, in violation of 18 U.S.C. § 1341. Counts Thirteen and Fourteen charge defendants Ferro, Jr., and Ferro, Sr., aided and abetted by defendant Swift, with conducting financial transactions, that is, the

depositing of checks, which checks represented the proceeds of a specified unlawful activity as defined 18 U.S.C. § 1956, that is, interstate transportation of property obtained by fraud as alleged in Counts Three and Five, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 2. Count Fifteen seeks forfeiture of property from defendants Ferro, Jr., Ferro, Sr., and Swift.

2. *The Statutes*

The statutes under which defendants are charged, 18 U.S.C. §§ 371, 1956, 2314, 1341 and 2, read in part:

> § 371. **Conspiracy to commit offense or to defraud United States**
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. .. .

18 U.S.C. § 371.

> § 1956. **Laundering of monetary instruments**
>
> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial

transaction which in fact involves the proceeds of specified unlawful activity —

> (A)(i) With the intent to promote the carrying on of specified unlawful activity ...

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

* * *

(h) Any person who conspires to commit any offense defined in this section ... shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1956(a)(1)(A)(i) and (h).

§ 2314. **Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting**

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud ...

* * *

Shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2314.

§ 1341. **Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1341.

§ 2. **Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands,

induces or procures its commission, is punishable as a principal.

18 U.S.C. § 2(a).

II. *FINDINGS OF FACT*

On November 23, 1999, the undersigned conducted an evidentiary hearing on Defendants' Joint Motion to Dismiss Indictment for Failure to State an Offense. Defendants Ferro, Jr., and Ferro, Sr., were represented by retained counsel David B.B. Helfrey and Gary W. Hart. Defendant Swift was represented by retained counsel Bruce Houdek. Defendant Staley was represented by retained counsel Ronald E. Partee. The Government was represented by Assistant United States Attorneys Bruce Clark and Paul Becker. Defendants called Dennis S. Corgill, an Associate Professor of Law at Widener University, and G. Ray Warner, a Professor of Law at the University of Missouri-Kansas City, as witnesses. The Government called no witnesses.

On the basis of the evidence adduced at the evidentiary hearing, the undersigned submits the following proposed findings of fact:

1. Ferro Pharmacy, Inc., d/b/a Penn Plaza Pharmacy, is a retail outlet of pharmaceutical drugs owned and operated by defendant Louie Ferro, Jr. (Tr. at 12-13, 22; Defendants' Ex. 3)[1] Home Care Pharmacy is an institutional pharmacy owned and operated by defendants Louie Ferro, Jr., and Louie

1. "Tr." refers to the transcript of the hearing held on November 23, 1999.

Ferro, Sr. (Tr. at 12, 22; Defendants' Ex. 3) Home Care Pharmacy receives its products at discounted prices. (Tr. at 12-13) Home Care Pharmacy sells to or services both nursing homes[2] and other wholesalers not associated with nursing homes. (Tr. at 13)

2. The diversion market in the pharmaceutical industry is a market in which purchasers of pharmaceutical products, either for export or purportedly under the exemption created by the Nonprofit Institutions Act, receive pharmaceutical products at a discounted price and then resell them in a different channel of distribution for a higher price. (Tr. at 16) One channel of distribution is called a "closed door" channel. (Tr. at 16) It is called a "closed door" channel because once the purchaser receives the pharmaceutical products, their doors are closed to any sale in competition. (Tr. at 16) An example of a "closed door" channel would be a pharmacy in a not-for-profit hospital where the pharmacy only dispenses drugs to people who are patients in the hospital and would not sell them outside the hospital to walk-in patients or others; that is the doors are closed to any customers who might come in from the outside. (Tr. at 16-17) The other channel of distribution is the "open door" channel. (Tr. at 17) In the "open door" channel, once the purchaser receives the pharmaceutical products, their doors are open to any customer who may walk in. (Tr. at 17) An example of an "open door" channel would be a retail pharmacy. (Tr. at 17)

3. The manufacturers of pharmaceutical products follow a practice of selling at a low price in the "closed door" channel

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2. By letter of January 5, 2000, the Court was advised that Home Care Pharmacy also services group homes.

and at a higher price in the "open door" channel. (Tr. at 17) Penn Plaza Pharmacy is in the "open door" channel and pays more for pharmaceutical products than Home Care Pharmacy pays for the same products. (Tr. at 21-22) Home Care Pharmacy is in the "closed door" channel. (Tr. at 22-23) One example is a drug called Accupril for which Home Care Pharmacy is charged $38.18 and Penn Plaza Pharmacy is charged $73.75 by the same manufacturer. (Tr. at 22; Defendants' Ex. 12)

4. In the Agreement between GeriMed (a purchasing organization for the "closed door" distribution channel) and Home Care Pharmacy, Home Care Pharmacy represented itself to be a for-profit organization. (Defendants' Ex. 4A) The Agreement for Use of GeriMed Program Contract provided, in part:

> I certify that the above-named Client [Home Care Pharmacy] is not engaged in retail sales and that all items purchased through the GeriMed Program will be utilized consistent with the established guidelines based on United States Supreme Court decision in Abbott Laboratories, et al. vs. Portland Retail Druggists Association, et al. As used herein, any and all merchandise purchased under this program shall be for our own use. The phrase "own use" is limited to the following:
>
> 1. Dispensing of the product to inpatients or emergency patients for treatment at the facilities serviced by the client;

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2. Dispensing of the product to former patients upon their discharge as take-home prescriptions or supplies necessary for a limited and reasonable time as continuation of treatment;

3. Dispensing of the product to Client employees or employees of the facilities serviced by the Client for their own use or the use of their dependents (but not for the use of their non-dependent family members); or

4. Dispensing of the product to a staff member physician in a facility serviced by the Client for his or her personal use, or for the use of his or her dependents (but not other persons or for use in the physician's private practice).

I further represent and warrant that this Pharmacy shall not buy, distribute, sell, transfer, or use contract bid priced products or cause the distribution of bid priced products in any manner contrary to the requirements of "own use" or any terms and conditions contained in this document.

(Defendants Ex. 4A)

5. In Home Care Pharmacy's Credit Application with Baxter Healthcare Corp. (a pharmaceutical manufacturer), Home Care Pharmacy stated that it intended to resell goods purchased from Baxter and that it was a "Profit Corp." (Defendants' Ex. 4B)

6. In Contract Eligibility Certification Forms for Knoll Pharmaceutical Company, Home Care Pharmacy stated its profit status as "for profit." (Defendants' Exs. 4D and 6) Defendant Louie Ferro, Jr., wrote "NIA" next to a paragraph stating that the company was an eligible institution under the Non Profit Institutions Act, 15 U.S.C. § 13c. (Defendants' Ex. 4D) The forms further provided:

> Home Care Pharmacy certifies that although it is not a non profit institution within the meaning of the Non Profit Institutions Act, pharmaceuticals purchased at contract pricing are for Home Care Pharmacy's "own use", as defined in *DeModena, et al. v. Kaiser Foundation Health Plan., Inc., et al.*, 743 F.2d 13888 [sic] (9 Cir. 1984) applying the holding of the U.S. Supreme Court in *Abbott Laboratories, et al. v. Portland Retail Druggist Association, Inc.*, 425 U.S. 1 (1976).

(Defendants' Exs. 4D and 6)

7. In the Boehringer Ingelheim Pharmaceuticals, Inc. Account Application and Account Application Questionnaire, Home Care Pharmacy stated that it was "for Profit." (Defendants' Exs. 5 and 5A) Another Boehringer Ingelheim form, an Alternate Care Certification, provided: "I further certify that pharmaceuticals will be sold or dispensed only to members of this facility and only for the facility's "own use" within the meaning of the 15 USC, 13c (52 Stat. 446). (Defendants' Ex. 5)

8. Defendants' Exhibit 7 is a listing of facilities serviced currently or in the past by Home Care Pharmacy and

corresponding pages from a book entitled *The Greater Kansas City Guide to Nursing Homes and Extended Care Facilities*. (*See* Letter from Gary W. Hart to Court dated January 5, 2000) Of the twenty-two facilities named in Defendants' Exhibit 7, twenty-one are listed as being for profit. (Defendants' Ex. 7) *The Greater Kansas City Guide to Nursing Homes and Extended Care Facilities* is a publicly available document. (Tr. at 23-24)

9. Home Care Pharmacy attached a list of the fourteen facilities it serviced as of April 10, 1996, to the GeriMed Application, for Membership and to the Knoll Pharmaceutical Company Contract Eligibility Certification Form. (Defendants' Exs. 3 and 4D) Eleven of the fourteen facilities listed are "group homes" which would not be included in *The Greater Kansas City Guide to Nursing Homes and Extended Care Facilities.* (*See* Letter from Gary W. Hart to Court dated January 5, 2000) The profit or non-profit status of the other three facilities, Summit, Leisure Care and Clara Manor, which are nursing homes or extended care facilities, is not set forth in *The Greater Kansas City Guide to Nursing Homes and Extended Care Facilities* because these facilities chose to not be included in the book. *See* Letter from Gary W. Hart to Court dated January 5, 2000 and *The Greater Kansas City Guide to Nursing Homes and Extended Care Facilities*)

10. The Court has obtained a copy of the November 1999 Directory of Long-Term Care Facilities from the Missouri Department of Social Services, Division of Aging. This Directory is readily available to the public. The three facilities listed by Home Care Pharmacy in its April 10, 1996 GeriMed

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Application for Membership which are nursing homes or extended care facilities, Summit, Leisure Care and Clara Manor, are listed in the Directory of Long-Term Care Facilities as being for profit corporations.

11. Attached to Mr. Hart's letter of January 5, 2000, is an updated listing of the Home Care Pharmacy Nursing Home List which GeriMed provided to the Government on August 21, 1998. Of the thirty-one facilities listed, seventeen are listed in the Directory of Long-Term Care Facilities from the Missouri Department of Social Services, Division of Aging. Of these seventeen, twelve are listed as being for profit corporations, one as a sole proprietorship, two as limited liability companies, one as a partnership and one as a non profit corporation.

12. According to Professor Corgill, economic theory teaches that a manufacturer can increase profits and sell more product if it engages in price discrimination. (Tr. at 24) First, the manufacturer must segregate its customers into two groups. (Tr. at 24) One group would be a group of customers who are willing to pay a high price. (Tr. at 24) The other group would be customers who either cannot or are not willing to pay as high a price for the product. (Tr. at 25) Next, the manufacturer must prevent arbitrage, the practice by which somebody would receive products at a low price, but then turn around and sell those products to a customer from whom the manufacturer would have been able to receive a higher price. (Tr. at 25)

13. Professor Corgill testified that pharmaceutical products are considered commodities for purposes of the

Robinson-Patman Act, the Act to which we refer when we speak about illegal price discrimination. (Tr. at 28)

III. *DISCUSSION*

The Robinson-Patman Act[3] prohibits persons engaged in commerce from discriminating in prices between purchasers of goods of like grade, quality and quantity.

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3. The Robinson-Patman Act provides, in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .
>
> • • •
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. § 13(a) and (f).

15 U.S.C. § 13. Exempt from this prohibition are sales of supplies to non-profit institutions which purchase products for their own use. 15 U.S.C. § 13c.[4] The leading case on the applicability of the Nonprofit Institutions Act exemption is *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1 (1976). The *Abbott* court wrote:

> It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. The Court has recognized, also, that Robinson-Patman "was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." Because the Act is remedial, it is to be construed broadly to effectuate its purposes. Implied antitrust immunity is not favored. "[O]ur cases have repeatedly established that there is a heavy presumption against implicit [antitrust] exemptions." And the focus of Robinson-Patman is on competition "at the same functional level."

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4. The Nonprofit Institutions Act provides:

> Nothing in . . . the Robinson-Patman Antidiscrimination Act shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

15 U.S.C. § 13c.

Id. at 11-12 (citations omitted). The Court concluded that "the exemption provision of the Nonprofit Institutions Act is a limited one." *Id.* at 14.

The burden of establishing that a transaction falls within the exemption of the Nonprofit Institutions Act rests with the pharmaceutical manufacturers because the manufacturers enjoy the benefit of the antitrust exemption. *See Abbott Lab.*, 425 U.S. at 21. This burden is composed of two parts: (1) the manufacturers must identify the purchaser as a nonprofit institution; and (2) the manufacturers must routinely obtain a representation from the nonprofit institutional customer as to the use of the purchased products. *See Id.* at 21; *Rudner v. Abbott Lab.*, 664 F. Supp. 1100, 1103-04 (N.D. Ohio 1987).

All of the charges against defendants[5] stem from the underlying premise that defendants defrauded pharmaceutical manufacturers. Specifically, the Government alleges that defendants defrauded pharmaceutical manufacturers by signing own use clauses which represented that the pharmaceutical products purchased at discounted prices would be dispensed only for patients of nursing homes, but

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5. These charges include conspiracy to commit the crime of interstate transportation of property obtained by *fraud* and *mail fraud*, conspiracy to commit money laundering by depositing checks which represented the proceeds of the interstate transportation of property obtained by *fraud* and *mail fraud*, the interstate transportation of pharmaceutical goods knowing the same to have been obtained by *fraud*, *mail fraud* and money laundering by depositing checks which represented the proceeds of the interstate transportation of property obtained by *fraud*.

instead defendants sold the products to commercial wholesalers. (*See* Indictment at Count One, Manner and Means, ¶ 3) While the indictment does not specifically mention the Nonprofit Institutions Act, it appears that the Government is alleging that defendants defrauded the pharmaceutical manufacturers into believing that sales to Home Care Pharmacy came within the requirements of the Nonprofit Institutions Act because this appears to be the only legitimate use of an own use clause.

If the Government is alleging that defendants defrauded pharmaceutical manufacturers into believing that sales to Home Care Pharmacy came within the requirements of the Nonprofit Institutions Act, the Court finds that the Government's underlying premise in bringing these charges is wrong. Based on the evidence presented to the Court, the Court finds that the pharmaceutical manufacturers were not defrauded into believing that their sales to defendants were exempt from antitrust violations by virtue of the Nonprofit Institutions Act. Defendant Louie Ferro, Jr., repeatedly stated in the exhibits before the Court that Home Care Pharmacy was operated as a for-profit institution. (*See* Fact Nos. 4-7, *supra*) As such, it clearly did not come within the Nonprofit Institutions Act exemption. In addition, the pharmaceutical manufacturers were provided listings of the institutions Home Care Pharmacy serviced. (*See* Fact Nos. 9 and 11, *supra*) Many of these institutions, like Home Care Pharmacy, were operated as for-profit institutions and, therefore, did not come within the Nonprofit Institutions Act exemption. (*See* Fact Nos. 10 and 11, *supra*) The Court finds that the pharmaceutical manufacturers could not have reasonably believed that their sales to Home Care Pharmacy fell within the Nonprofit

Institutions Act because they were clearly advised that Home Care Pharmacy was a for-profit institution and with any diligence on their part could have determined that the institutions serviced by Home Care Pharmacy were also for-profit. Any subsequent misrepresentation by Home Care Pharmacy as to "own use" was immaterial to a determination regarding whether sales to Home Care Pharmacy were exempt under the Nonprofit Institutions Act.

The only case cited by the Government in opposition to defendants' motion to dismiss, *United States v. Weinstein*, 762 F.2d 1522 (11th Cir. 1985), does not persuade the Court otherwise. In *Weinstein*, the defendants were charged with conspiracy to defraud pharmaceutical manufacturers by misrepresentations made through use of interstate mail and wire transmissions. *Id.* at 1526-27. The defendants misrepresented themselves to pharmaceutical manufacturers as nonprofit or export organizations in order to obtain pharmaceuticals at discounted prices.[6] *Id.* at 1527. Unlike the misrepresentations by Home Care Pharmacy as to "own use," the misrepresentations by the defendants in *Weinstein* were *material* to a determination by the pharmaceutical manufacturers regarding whether sales were exempt under the Nonprofit Institutions Act and the underlying Robinson-Patman Act. If the defendants were in fact export organizations as they represented to the pharmaceutical manufacturers, sales to them were not regulated by the

6. By its terms, the Robinson-Patman Act does not cover sales of goods for export. *See* 15 U.S.C. § 13(a). As discussed above, the Nonprofit Institutions Act provides an exception to the Robinson-Patman Act for sales to nonprofit organizations. *See* 15 U.S.C. § 13c.

Robinson-Patman Act. Likewise, if the defendants were in fact nonprofit organizations as they represented to the pharmaceutical manufacturers, sales to them fell under the Nonprofit Institutions Act exemption (assuming that they were purchasing the pharmaceuticals for their own use). As set forth above, the misrepresentations made by defendants in the case before this Court were not material to a determination as to whether sales to Home Care Pharmacy fell under the Nonprofit Institutions Act given that Home Care Pharmacy, once it identified itself as a for profit institution, could not qualify for discounted prices under the Nonprofit Institutions Act. Having identified itself as a for profit institution, it was immaterial whether any drugs that Home Care Pharmacy purchased were for its "own use."

The Court acknowledges that "materiality is not a separate essential element of wire fraud." *See United States v. Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) (quoting *United States v. Daily*, 921 F.2d 994, 1006 (10th Cir. 1990)). However, as the Tenth Circuit Court of Appeals stated in *Daily*:

> To be sure, there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud. More specifically, there is a materiality aspect to the determination whether the alleged representations of the accused are fraudulent.

921 F.2d at 1006. The Tenth Circuit found that the trial court properly submitted the aspect of materiality to the jury in the following instruction as to wire fraud:

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> A statement or representation is "false" or "fraudulent" within the meaning of this statute if it is related to a material fact and is known to be untrue or is made or caused to be made with intent to defraud. . . . A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction.

921 F.2d at 1006 n.15. While issues of materiality are normally reserved for a jury, where no reasonable mind could find a statement material, the trial court may decide the issue of materiality. *See United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) ("unless no reasonable mind could find a statement or omission to be material, a criminal trial court must submit the issue to the jury"); *United States v. Autuori*, 1998 WL 774232, *22 (D. Conn. Aug. 28, 1998) (same). The Court finds that no reasonable mind could find that the misrepresentations defendants made with respect to the own use clauses were material to the pharmaceutical manufacturers in deciding whether sales to Home Care Pharmacy came within the requirements of the Nonprofit Institutions Act.

Not only were the "own use" representations not material once the for profit status of Home Care Pharmacy had been disclosed, but as a matter of law, the Government cannot satisfy other requirements for a fraud claim. By definition, a fraud is "an intentional or deliberate misrepresentation of

the truth for the purpose of inducing another, in reliance on it, to part with a thing of value or to surrender a legal right." Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, Federal Jury Practice and Instructions § 16.08 (5th ed. 2000). Defendants did not induce the pharmaceutical manufacturers to part with anything to which they had a legitimate right. Under Missouri law, contract provisions which violate the law are illegal and unenforceable. *See Grannemann v. Columbia Ins. Group*, 931 S.W.2d 502, 506 (Mo. Ct. App. 1996).

While the exhibits before the Court do suggest that Home Care Pharmacy deceived the pharmaceutical manufacturers into believing that Home Care Pharmacy would not resell the products it purchased to wholesalers to be made available in the retail market (*see* Fact Nos. 4, 6 and 7, *supra*), the Court finds that defendants cannot be held criminally liable for failing to follow through with what appears to be a scheme by the pharmaceutical manufacturers to engage in illegal price discrimination.

The Court will not assist the pharmaceutical manufacturers in furthering what appears to be a pricing scheme in violation of the antitrust laws.

IV. *CONCLUSION*

For the reasons set forth above, the Court finds that defendants cannot be prosecuted on the current charges which require an underlying finding of fraud. Therefore, it is

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RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order granting Defendants' Joint Motion to Dismiss Indictment for Failure to State an Offense (doc #51).

Counsel are reminded they have ten days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections to same. A failure to file and serve timely objections shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

s/ Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE

Date: February 8, 2000
Kansas City, Missouri

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 2, 2001

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2467

United States of America,

Appellant,

vs.

Louie A. Ferro, Jr.; Louie A. Ferro, Sr.; Wilbur Swift, also known as Bill Swift; Kevin D. Staley,

Appellees.

Order Denying Petition for Rehearing
and for Rehearing En Banc

Appellees' petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

August 2, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E — STATUTORY PROVISIONS INVOLVED, 15 U.S.C. § 13(a) AND 15 U.S.C. § 13c

The provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a), relevant to this petition are as follows:

(a) Price; selection of customers

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them ....

An exemption to this prohibition exists under the Nonprofit Institutions Act, 15 U.S.C. § 13c, as follows:

> § 13c. Exemption of non-profit institutions from price discrimination provisions
>
> Nothing in the Act ... known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

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LOUIE A. FERRO, JR.; LOUIE A. FERRO, SR.;
WILBUR SWIFT; KEVIN D. STALEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Pablo A. Rolon, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by *Counsel of Record for Petitioners.*

That on the 1st day of November, 2001, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

Theodore B. Olson
SOLICITOR GENERAL OF THE UNITED STATES
Attorney for Respondent
950 Pennsylvania Avenue, NW
Room 5614
Washington, District of Columbia 20530-0001
(202) 514-2217

by depositing three copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service, via first-class mail.

That on the same date as above, I sent to this Court forty copies of the within *Petition for a Writ of Certiorari* through the United States Postal Service by Express Mail, postage prepaid.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of November, 2001.

Pablo A. Rolon

Sworn to and subscribed before me this 1st day of November, 2001.

Michael DeSantis